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No. 91-794

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

HENRY HARPER, et al,

Petitioners,

v.

VIRGINIA DEPARTMENT OF TAXATION,

Respondent.

On Writ of Certiorari to the
Supreme Court of Virginia

AMICUS CURIAE BRIEF OF THE CITY OF NEW YORK IN SUPPORT OF RESPONDENT

O. PETER SHERWOOD,
Corporation Counsel of the
City of New York,
100 Church Street,
New York, New York 10007.
(212) 788-0835 or 0841

EDWARD F. X. HART,*
FRANCES J. HENN,
STANLEY BUCHSBAUM,
of Counsel.

September 4, 1992.

*Counsel of Record.

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AMICUS CURIAE BRIEF OF CITY OF NEW YORK IN SUPPORT OF RESPONDENT

Interest of the Amicus Curiae

Pursuant to Rule 37.5, the City of New York, as a political subdivision of the State of New York, is exercising the right to file a brief amicus curiae in support of the position of the State of Virginia.

The City's interest in the case stems from the fact that a similar question of liability for a tax refund may arise under the personal income

tax law which the City imposes. That law excludes from the tax the amounts paid as pensions by the State of New York or by its political subdivisions, including the City of New York. [New York City Administrative Code, Title 11, §11-1712(c)(3)(i)]. No such exclusion was provided for pensions paid by the federal government until a statutory amendment was enacted in 1989 to take effect on January 1 of that year. [Id., §11-1712(c)(3)(ii); N.Y. Laws 1989, c.664.]

Summary of Argument

Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989), did not decide whether its determination should be applied prospectively or retrospectively. The Court indicated that Mr. Davis was entitled to a refund, but this was based upon a concession that this was the appropriate relief by the State of Michigan when the appellant had also sought such relief. Such concession or agreement is usually accepted by

the Court and, as a result, no attempt is made to decide the issue that would otherwise arise. Here it seems clear that the Court relied on the concession. Nor does James B. Beam Distilling Co. v. Georgia, __U.S.__, 111 Sup. Ct. 2439 (1991), or any of the principles decided in that case determine the issue of Davis retroactivity.

Since 1965 in a variety of cases, both civil and criminal, it has been held that particular determinations made by this Court shall apply only prospectively. In Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), a three-prong test was formulated to apply to civil cases. The Davis case fully satisfies all the prongs of that test.

ARGUMENT

THE DETERMINATION MADE IN DAVIS v. MICHIGAN SHOULD BE APPLIED PROSPECTIVELY WHEN IT IS EXTENDED TO INCOME TAX LAWS OF OTHER STATES AND MUNICIPLALITIES.

a. This Court did not decide whether its decision in the Davis Case should be treated as prospective or retrospective.

The petitioners seek to avoid discussing whether the Davis case should be applied prospectively or retrospectively. They contend that the decision was already made in the determination of that case. They take this position despite the fact that, in Davis, this Court said (489 U.S. at 817):

> The State having conceded that a refund is appropriate in these circumstances, see Brief for Appellee 63, to the extent appellant has paid taxes pursuant to this invalid tax scheme, he is entitled to a refund.

The concession to which the Court referred also accorded with the relief sought by the appellant in the conclusion of his main brief

(p.27) and repeated at page 10 of his reply brief.

Where both parties agree, for example, to the measure of relief to be granted to a successful plaintiff, the courts normally accept their conclusion. The basic governing principle has been well stated in Mitchell v. New York Hospital, 61 NY2d 208 (1984), where the Court said (p. 214):

> Whenever the enforceability of a stipulation among parties in a civil case is put in issue, we must begin our analysis with the recognition that courts have long favored and encouraged the fashioning of stipulations as a means of expediting and simplifying the resolution of disputes. (Salesian Soc. v Village of Ellenville, 41 NY2d 521, 525-526.) We have repeatedly held that, unless public policy is affronted, parties to a civil dispute are free to chart their own litigation course. (T.W. Oil v Consolidated Edison Co., 57 NY2d 574, 579-580; Rector, Church Wardens & Vestrymen of St. Bartholomew's Church v Committee to Preserve St. Bartholomew's Church, 56 NY2d 71, 76; Martin v City of Cohoes, 37 NY2d 162, 165.) They "may fashion the basis upon which a particular controversy will be resolved" (Cullen v Naples, 31 NY2d 818, 820) and in

> doing so "[t]hey may stipulate away statutory, and even constitutional rights." (Matter of New York, Lackawanna & Western R.R. Co., 98 NY 447, 453).

Essentially the same principle has been applied by this Court and lower federal courts. See, e.g., Pacific R.R. v. Ketchum, 101 U.S. 289, 297 (1879); Prout v. Starr, 188 U.S. 537, 542 (1903); Johnson v. United States, 318 U.S. 189 (1943); Muslin v. Frelinghuysen Livestock Managers, 777 F.2d 1230, 1231, n.1 (7th Cir., 1985); Calvin Klein Ltd. v. Trylon Trucking Corp., 892 F.2d 191, 194 (2d Cir., 1989).

Michigan also applies the same stipulation principle. Harris v. Sweetland, 48 Mich. 100, 11 N.W. 830, 831-2 (1882); Kline v. Kline, 92 Mich. App. 62, 284 N.W.2d 488, 492-3, 495-6 (1979). See Dana Corp. v. Appeal Board of Mich. Emp. Sec. Com'n, 371 Mich. 107, 123 N.W.2d 277, 278 (1963).

Courts generally look with favor on such stipulations. 83 C.J.S. Stipulations, §2.

Normally such stipulations must be in writing or made in open court. Where, however, the intent of the parties is made clear, even an implied or informal stipulation will be followed. Cates v. Morgan Portable Bldg. Corp., 780 F.2d 683, 687-8 (7th Cir., 1985); Muslin v. Frelinghuysen Livestock Managers, supra, 777 F.2d at 1231 n.1; International Adm'rs. v. Life Ins. Co., 753 F.2d 1373, 1376 (7th Cir., 1985); Cullen v. Maples, 31 N.Y.2d 818, 820 (1972). See 83 C.J.S. Stipulations §4b (3).

Normally a stipulation may not deal with questions of law. Stipulations with regard to damages, however, are regarded as appropriate. Burstein v. United States, 232 F.2d 19, 23 (8th Cir., 1956); Fisher v. First Stamford Bank and Trust Co., 751 F.2d 519, 523 (2d Cir., 1984); Murphy Door Bed Co. v. Interior Sleep Systems, 874 F.2d 95, 103 (2d Cir., 1989); City of Novi v. City of Detroit, 166 Mich. App. 397, 420 N.W.2d 839, 843

(1988); T.W. Oil v. Con Edison Co., 57 N.Y.2d 574, 579-80, 586-7 (1982).

In Davis, as we have earlier pointed out, the State conceded that a refund was the appropriate relief for the appellant to the extent that he had paid taxes under what this Court found to be an invalid tax scheme. This concession was in accord with relief sought by the appellant. This clear agreement between the parties is essentially the equivalent of a stipulation covering the nature of the relief.

Under the circumstances it seems plain that this Court did not consider whether the relief to be granted for those affected by the invalid tax scheme was to be prospective or retrospective. Certainly there was no discussion of that issue. And the reliance on the concession makes it plain that the issue was not considered, since the concession dealt with all the relief necessary in Davis.

The appellants attempt to escape this by an unusual contrivance. They assert that the concession made by the State of Michigan in Davis could not be considered until this Court first found the tax invalid and then decided to apply that holding to Mr. Davis (App. Br., p.8-9). In substance, they seem to be arguing that this Court need not have relied on the concession, since it had already been decided what relief for invalidity should be granted to Mr. Davis.

The appellants, in addition, rely on James B. Beam Distilling Co. v. Georgia, __U.S.__, 111 Sup. Ct. 2439 (1991), as a basis for concluding that the determination of this Court in Davis decided that it should be applied retroactively. First, they state that an opinion that makes no mention of retroactivity decides that retroactivity shall apply (App. Br., p.10). They rely on the dictum of Justice Souter in Beam at 111 Sup. Ct. at 2445-6, n.2, which is

introduced by: "Though unnecessary to our ruling here ***", indicating that it is mere dictum. Justice Souter's opinion is joined by only one other justice, Justice Stevens. We can find no such clear intimation in Justice White's concurring opinion. The portion quoted by the appellants from Justice White's opinion appears to refer to the decision concerning the Twenty-First Amendment.

Nor is there any such suggestion in the concurring opinions of Justices Blackman and Scalia, each joined by the other and also by Justice Marshall. They concurred in the result in Beam on the basis of their view that all decisions must be applied retroactively and that applying a determination prospectively would go beyond the power of the Court. Their view does not mean that they concluded that a failure to discuss retroactivity or prospectivity, such as occurred in Davis, means that the Court has decided that retroactivity applies.

The basis for the conclusion they reached makes such a decision unnecessary since, by their approach, retroactivity would always automatically govern. Should these three Justices ultimately decide that stare decisis required them to accept prospectivity under some circumstances, they would then be faced, apparently for the first time, with the question of whether a failure to discuss the matter is, in effect, a decision calling for retroactivity.

In any event, it would seem strange that a determination of major consequence could rest on mere silence by the Court. In at least some of these cases, the briefs may not discuss the issue of retroactivity. Consequently, an issue undiscussed in the briefs would be decided by a decision unexpressed in the opinion.

If a presumption that silence in the opinion indicates that the Court has decided that retroactivity shall apply, it would surely not govern where the opinion explicitly indicates

that the issue was not considered either because of a concession or an implied stipulation by the parties. Apparently the petitioners seek to go beyond Justice Souter's determination resting on silence. They would have the Court hold that, even though there is a basis for deciding the case without passing on the issue of retroactivity and even though the Court indicated it was relying on that other ground, it must be concluded that the Court, in some unusual way, considered retroactivity and decided that it applied.

b. **Prospectivity**.

(1)

Until the 1965 decision of Linkletter v. Walker, 381 U.S. 618, almost any decision overruling a prior decision or reaching a new or novel result, criminal or civil, constitutional or not, would be treated as retrospective. Up to that time, the Supreme Court, and most state courts, followed what has been termed the

Blackstonian theory of law to the effect that a court, in overruling an earlier decision, did not make a new law. Rather, it merely expounded or vindicated the old one from a prior misrepresentation. It treated the old decision, not as bad law, but as simply not being the law. The new decision was an application of what had always been the true law. Linkletter, 381 U.S. at 622-5; Note, Prospective or Retroactive Operation of Overruling Decision, 10 ALR 3rd 1382; Cardozo, The Nature of the Judicial Process (1921), pp. 124-125.

Despite the general rule applied theretofore, the Court in Linkletter relied, in part, on a variety of cases to reach the conclusion that the Court was not required to treat each such determination as retroactive, but rather that it would determine the question of retroactivity by weighing the merits. Linkletter, 381 U.S. at 628-9; Robinson v. Neil, 409 U.S. 505, 507 (1973). In Linkletter,

the Court also indicated that no distinction need be drawn between civil and criminal cases. Linkletter, 381 U.S. at 627-8.

After this shift in the approach to the issue of retroactivity, many criminal cases involving constitutional issues were, until 1987, held to apply prospectively. See, e.g., Stovall v. Denno, 388 U.S. 293, 296-297 (1967); Adams v. Illinois, 405 U.S. 278, 284 (1972); Allen v. Hardy, 478 U.S. 255, 258 (1986). (In Griffith v. Kentucky, 479 U.S. 314, 328 [1987], it was held that new rules governing criminal procedure would apply retroactively to all cases pending on direct review or not yet final.)

Prospectivity was applied also to a number of civil cases. See, e.g., Cipriano v. City of Houma, 395 U.S. 701 (1969); Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87-88 (1982); Florida v. Long, 487 U.S. 223, 235, 240 (1988).

A three-prong test was devised in Stovall v. Denno, supra, 388 U.S. at 297, for determining whether the decision in a criminal case should be treated as retroactive. A slightly different three-prong test was established shortly thereafter for civil cases. Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107 (1971).

In criminal cases the three-prong rule was later modified or expanded. It was first held that a decision announcing a new standard is almost automatically nonretroactive. United States v. Johnson, 457 U.S. 537, 549-550 (1982); Solem v. Stumes, 465 U.S. 638, 645-646 (1984); Allen v. Hardy, supra, 478 U.S. at 258. However, Griffith v. Kentucky, supra, 479 U.S. 314, concluded that new rules governing criminal matters would apply retroactively to all cases pending on direct review. But recent cases make it clear that the

new rule will not be applied when a conviction is challenged in a collateral attack. Teague v. Lane, 489 U.S. 288 (1989); Butler v. McKellar, 497 U.S. 407 (1990).

The three-prong test used in civil cases emphasizes the break with the past as its first prong. The three factors to be considered in determining whether retroactivity shall apply in civil matters are stated in Chevron Oil Co. v. Huson, supra, 404 U.S. at 106-107:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e.g., Hanover Shoe v. United Shoe Machinery Corp, supra, [392 U.S.] at 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., Allen v. State Board of Elections, supra, [393 U.S.] at 572. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard the operation." Linkletter v. Walker,

> supra, [381 U.S.] at 629. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." Cipriano v. City of Houma, supra, [395 U.S.] at 706.

This three-factor test has been applied regularly since the Chevron case was decided in 1971. See, e.g.: Northern Pipeline Co. v. Marathon Pipe Line Co., supra, 458 U.S. at 87-88; Saint Francis College v. Al-Khazraji, 481 U.S. 604, 608-9 (1987); Goodman v. Lukens Steel Co., 482 U.S. 656, 662-3 (1987); American Trucking Association, Inc. v. Smith, 496 U.S. 167 110 Sup. Ct. 2323, 2331 (1990); cf., Florida v. Long, 487 U.S. 223, 230 et seq. (1988).

Although Davis did not involve the overruling of a clear past precedent, it did decide an issue of first impression whose resolution was not clearly foreshadowed.

A finding that the first prong of the Chevron test has not been met should not rest on the emphatic language used in the Davis majority opinion. The Court there said that the "plain language of the statute" dictates the result reached and that it had "no difficulty" in reaching that conclusion (489 U.S. at 808). The meaning of the statute was found to be "unmistakable" (id. at 810). Similar forceful language might also be used in an opinion overruling a prior determination of this Court. For example, it is not unusual to say that the determination being set aside rested on no sound legal basis. Moreover, while eight justices joined in the Davis opinion, one member of this Court dissented.

Here the issue decided was plainly of "first impression" and its "resolution was not clearly foreshadowed." This is shown by the history of state and local tax exemptions for pension income of their own former employees.

The federal statute, 4 U.S.C. §111, was enacted in 1939. As early as 1920, New York State had enacted a tax exemption for pensions of State and local employees (N.Y.Laws 1920, c.741, §70). That year a similar tax exemption provision was also enacted for New York City (N.Y.Laws 1920, c.427, §1, amending Greater New York City Charter §1723). These provisions have continued until the present. An amendment to the New York Constitution, adopted in 1938 and effective on January 1, 1939, provided for exemption from taxation for employees of the State and its subdivisions (Const. Art. 5, §7, Art. 16, §5).

New York State had an income tax for many years before 1939 (N.Y. Tax Law, Art. 16, now in Art. 22). New York City's personal income tax took effect in 1966 (N.Y.C. Admin. Code, Title T, now in Admin. Code, Title 11, ch.17).

At least one other State had exempted pensions of its former employees from its own income tax before 4 U.S.C. 111 was enacted. Mont. Laws 1937, c.87, §13. A number of other States enacted similar exemptions within a few years after 1939. E.g., 1941 N.C. Sess. L., c.25 §9; Ch 325, 1942, Va. Acts 500; 1945, S.C. Code of Laws §9-1-1680.

In the course of time, other states adopted similar tax provisions so that, when the Davis case reached the courts, there were 23 states, in addition to Michigan, providing such an exemption. See, Harper v. Virginia Dept. of Taxation, 241 Va. 232, 401 S.E.2d 868, 871, n.3 (1991); Federal Tax Administrators, Research Report No. 131, entitled Davis v. Michigan Department of Treasury: One Year Later.

Thus we have two states adopting legislation before the federal enactment in 1939 and numerous other states adopting similar

legislation over the years since then. All granted exemption on pension income of former state or local employees without providing a similar exemption to pensions of former federal employees. Yet, so far as we have been able to find, no case was brought in the courts challenging the state and local employee exemptions until the Davis case was begun in 1984, a lapse of 45 years from enactment of the federal law to the challenge.*

It is difficult to conclude that Davis was foreshadowed when at least 24 state legislatures enacted new, or continued prior, statutes, if the indications were evident that the legislation was doomed to fail upon challenge. It is even more difficult to believe that, if that were so,

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* The case of Streight v. Ragland, 280 Ark. 206, 655 S.W.2d 459 (1983), decided only a year before Davis commenced, unsuccessfully challenged such a statute on behalf of private pensioners, relying on equal protection grounds.

no federal pensioner thought it worthwhile to challenge the state tax on his pension in any of those states.

Aside from the legal issues raised by Justice Stevens in his dissent, this history of the numerous Davis type statutes should, we submit, be enough to meet the first prong of Chevron.

The second Chevron prong involves the consideration of the prior history of the rule, its purpose and effect, and whether retrospective operation will further or retard these considerations. In light of Davis, we must assume that a state's tax on pensions was to be treated the same as one on wages with regard to the limitations of 4 U.S.C. 111. That, however, apparently was not the view of the federal pensioners until the Davis decision. From all appearances they did not assert such a right until after this Court's determination. To give them retrospective benefit would be to give

them refunds which they neither expected nor made claim for until Davis was instituted.

Moreover, in Virginia the Davis type of relief has now been granted by legislation enacted in 1989, taking effect for taxable year 1989. In New York, a new law grants full tax exemptions to federal pensioners under both state and local income taxes for taxable years beginning on or after January 1, 1989 (N.Y.Laws 1989, ch.664).

There would appear to be no ground for treating the second prong as calling for retrospectivity except to provide an unexpected windfall to federal pensioners.

The third prong of Chevron weighs the inequity of the imposition of a retroactive application. As noted, there would be no inequity to federal pensioners because all that retroactivity would give them would be an unanticipated refund. Judicial notice, however, may be taken of the dire fiscal straits of states

and cities. A study by the Federation of Tax Administrators concludes that retroactive refund claims could exceed $2 billion (Research Report No. 131, April 1990, p.8, Table 3, p.18). The impact of retroactivity would be substantial for many, if not most, of them.

While in New York there are two factors that would somewhat reduce the impact of a determination that Davis applies retroactively as compared with the impact upon Virginia, the impact upon New York will nevertheless be substantial. First, the State and the City of New York have, since 1981, provided an exemption of up to $20,000 on all pensions of persons 59½ or older, whether the pension is private or public [N.Y. Tax Law, §612 (c) (3-a); N.Y.C. Admin. Code, §11-1712(c) (3-a)].

Second, in New York there are limitations on the recovery of refunds that may not be applicable in other states. Recovery may be

had, as in most other states, pursuant to the administrative tax procedure. In New York an application for such a refund must be made within three years after the tax return was filed or two years from the time the tax was paid [N.Y. Tax Law, §687(a); N.Y.C. Admin. Code, §11-1787(a)]. Recovery may also be had in an action for money had and received with six year period of limitations, but such a recovery is available only when the tax payment was made under protest or was compelled by duress. Mercury Machine Imp. Corp. v. City of New York. 3 N.Y.2d 418 (1957); Rochester v. Chiarella, 58 N.Y.2d 316, 323 91983); Mtr. of Fiduciary Trust Co. v. State Tax Comm., 120 A.D.2d 848, 850 (3rd Dept., 1986).

Although Griffith v. Kentucky supra, has shifted the rule with respect to criminal matters on direct review so that any new determination will be applied retroactively, this provides no reason to abandon the Chevron approach to

civil cases. A failure to apply retroactivity in a criminal case leaves a man in prison. There is no such drastic impact in civil cases. Often, as in the present case, making the Davis case retroactive would merely provide windfalls for persons who had no reason to believe that a portion of their taxes would be refunded.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE AFFIRMED.

Respectfully submitted,

O. PETER SHERWOOD,
Corporation Counsel of
the City of New York,
Attorney for Amicus Curiae
City of New York.

EDWARD F. X. HART,*
FRANCES J. HENN,
STANLEY BUCHSBAUM,
of Counsel.

September 4, 1992.

*Counsel of record.